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Supreme Court, U. S.
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In the

Supreme Court of The United States

OCTOBER TERM 1972

No. 72-1202

VALLEY OIL COMPANY,

Petitioner,

v.

THE CITY OF GARLAND, TEXAS,

Respondent.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

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THE CITY OF GARLAND, TEXAS,

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REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent prays this Honorable Court not issue a Writ of Certiorari to review the Judgment and Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, entered in this proceeding on June 22, 1972.

QUESTIONS PRESENTED

1.

The procedural questions involved are: (a) Whether or not Petitioner has brought itself within the purview of those provisions which would allow granting the Writ and (b) Whether or not the Fifth Amendment and equal protection under the

Fourteenth Amendment have a place in the Court's consideration.

2.

The only substantive question resolves itself into whether or not, under the facts, Respondent's City Council acted arbitrarily and unreasonably or in pursuance of the public health, safety, morals, or welfare.

STATEMENT OF THE CASE

So as not to unduly burden the Court in consideration of whether or not to grant the Writ, and for that purpose only, Respondent accepts Petitioner's statement of the case with two exceptions.

First, minimal factual considerations are imperative in evaluating Respondent's Reason for Denying the Writ #(c), *infra;* therefore, for convenience and clarity, such are included therein.

Second, Petitioner's conclusion (Petitioner's petition for a Writ of Certiorari, hereinafter cited as "pet.," page 9) relating to Respondent's "void ordinance absolutely prohibiting operation of self-service gasoline stations" is unsubstantiated and a fraud upon the Court as it has no basis in fact or in law.

It is presumed this statement is based on Section 2(c) of Article 1111c, Texas Penal Code (pet. pages 6 & 7). What Petitioner neglected to bring to this Court's attention was that Section 8 of this Act (properly cited Art. 1111c-1, Texas Penal Code) provides "* * * that any municipal or county ordinances, rules, or regulations in force and effect on the effective date of this Act shall not be invalidated because of any provision of this Act." Petitioner admits Respondent's ordinance on self-

service stations was adopted in 1966 (pet. page 6) and the Act was not effective until 1969 (pet. page 7).

REASONS FOR DENYING THE WRIT

(a) THE PETITIONER HAS NOT BROUGHT ITSELF WITHIN THE PURVIEW OF THE ACTS OF CONGRESS AND RULES OF THIS COURT WHICH PERMIT GRANTING SUCH WRITS.

Petitioner in its statement of jurisdiction (pet. page 2) invokes 28 U.S.C., Section 1257(3); however, at no point does it specify what provision thereof, nor does it inferentially, much less directly, attempt to bring itself within any of said provisions.

Further, Rule 19 of this Court provides the Writ is addressed to "sound judicial discretion and will be granted only where there are special and important reasons therefor." Petitioner has probably not pleaded or demonstrated any "important reasons." It clearly has not shown any "special reasons."

(b) THE FIFTH AMENDMENT AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT HAVE NO PLACE IN THIS PROCEEDING.

While Petitioner alludes to the Fifth Amendment (pet. pages 3 & 10), it is not a proper subject for consideration by this Court, as the Fifth Amendment is not a restraint on Respondent but on the government of the United States of America.

In various pleadings before the Trial Court, three proceedings before the intermediate appellate court, two proceedings before the highest appellate court of the State, and the application to stay the mandate filed with this Honorable Court, Petitioner has never mentioned "equal protection." If it is, in fact, attempting to raise the issue at this time, (pet. page 3), Respondent would

only answer that, after seven previous pleadings and proceedings, surely such has been waived and should not be given due consideration in this Court in the first instance.

(c) RESPONDENT'S ACTION WAS A VALID EXERCISE OF ITS POLICE POWER; THEREFORE, IT SHOULD BE SUSTAINED (RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT "(a)" & "(b)".

Assuming this Court feels Petitioner has surmounted the procedural inadequacies of its petition above noted in #(a), the only question to be determined is whether the subject ordinance is "clearly arbitrary and unreasonable," as it must be before it can be declared unconstitutional, or is it a proper exercise of the power to protect the public health, the public morals, the public safety, or the public welfare, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) at page 395, *Nectow v. Cambridge*, 277 U.S. 183 (1928) at page 188.

Remembering that "while the constitutional guarantees never varies (sic), the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of operation," *Euclid v. Ambler Realty Co., supra,* at page 387, that consideration of financial loss or of so called 'vested rights' in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality, *Standard Oil v. City of Tallahassee,* 183 F. 2d 410, cert. denied, 340 U.S. 892 (5th Cir. 1950) at page 413 and *Geneva Inv. Co. v. City of St. Louis,* 87 F. 2d 83, cert. denied, 301 U.S. 692 (8th Cir. 1937), and that abatement of a non-conforming use is not *per se* invalid, *Standard Oil v. City of Tallahassee, supra; Swain v. Board of Adjustments,* 433 S.W. 2d 727 (Tex. Civ. App. N.R.E. 1968)

cert. denied, 396 U.S. 277, rehearing denied, 397 U.S. 977; *City of University Park v. Benners,* ..... Tex. ....., 485 S.W. 2d 773 (1972); *National Advertising Co. v. County of Monterey,* 1 Cal. 3d 875 (1970); *Board of Supervisors v. Miller,* 170 N.W. 2d 358 (Iowa-1969); *Spurgeon v. Board of Commissioners,* 181 Kan. 1008 (1957); *Grant v. Mayor & City Council of Baltimore,* 212 Md. 301 (1957); *Naegele Outdoor Advertising v. Village of Minnetonka,* 281 Minn. 492 (1968); *Wolf v. City of Omaha,* 177 Neb. 545 (1964); *Lachapelle v. Town of Goffstown,* 107 N.H. 485 (1967); *Harbison v. City of Buffalo,* 4 N.Y. 2d 553 (1958); *City of Seattle v. Martin,* 54 Wash. 2d 541 (1959); *Village of Gurnee v. Miller,* 69 Ill. App. 2d 248 (1966), was Respondent's action confiscatory, as alleged by Petitioner, or a valid police power exercise? These facts, although not exclusive, for brevity's sake, well reflect the answer:

1. That Respondent's Board of Adjustment, after two meetings with notice and hearing, transmitted certain findings to Respondent's City Council who held an additional hearing, after notice. Based on these proceedings, the Council found, as a fact, that the property was a nuisance, a fire hazard, and without water or sewer service; that it violated the sanitary laws of the State, the platting statute of the State, and the building codes of the City; that it was detrimental to the adjacent and surrounding properties; and that it was detrimental to the orderly development of the area (ordinance #1818, pet. pages 26-28).

2. That Respondent was given sufficient time to more than amortize non-land uses (ordinance #1818, pet. page 28 and Civil Appeals' opinion, pet. page 21).

3. That the Court of Civil Appeals' interpreting the laws of

the State determined Petitioner never had a non-conforming use (pet. page 18).

4. That the Court of Civil Appeals determined the City's ordinance was not arbitrary and unreasonable (pet. page 20).

5. That Petitioner purchased the land long after annexation and zoning, thereby attempting to extend and enlarge a non-conforming use.

6. That to permit a non-conforming use perpetuates a monopoly in contravention of public policy.

7. That, except for three churches, the surrounding land was totally residential in character.

8. That the only evidence that Petitioner would lose $19,000.00 on the land came in the Trial Court where testimony was offered the property was purchased for $20,000.00 and would sell for $1,000.00. This opinion should be viewed as highly suspect, as it came (over objection) from a party in interest with no expertise to appraise the property which he had not seen in one or more years. Further, he tendered no opinion on the value of the property for 41 of the 42 uses allowed under present zoning, tendered no opinion on the highest and best use of the land, and tendered no opinion on the value of the property should it be rezoned.

In evaluating these facts, Respondent would ask the Court to consider its own guidelines for reviewing zoning matters. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed, "*Euclid v. Ambler Realty Co., supra,* page 388, as the Court

is "* * * not warranted in substituting [its] judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question," *Nectow v. Cambridge, supra,* page 188; therefore, the Court "should not set aside the determination of public officers in such a matter unless it is clear the action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense'", *Nectow v. Cambridge, supra,* page 188.

CONCLUSION

For these reasons, a Writ of Certiorari should not issue to review the Judgment and Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

Respectfully submitted,

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March 21, 1973